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In the Supreme Court of the United States

October Term, 1948

WILLIAM H. HATT, Warden, United States Penitentiary, Lewisburg, Pennsylvania, *Petitioner*,

vs.

HOWARD W. SMITH.

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No. 457

WILLIAM H. HIATT, Warden, United States Penitentiary, Lewisburg, Pennsylvania, *Petitioner*,

v.

BERNARD W. SMITH

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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The Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit (R. 287) reversing the order of the District Court for the Middle District of Pennsylvania (R. 275) dismissing a rule to show cause why a petition for a writ of habeas corpus should not issue and denying the petition, and remanding the cause with directions to discharge the relator, respondent herein, from custody.

OPINIONS BELOW.

The majority and dissenting opinions in the Court of Appeals (R. 277-287) are reported at 170 F. 2d 61. The opinion of the District Court (R. 264-275) is reported at 72 F. Supp. 935.

JURISDICTION.

The judgment of the Court of Appeals was entered September 14, 1948 (R. 287). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether the 70th Article of War, directing a "thorough and impartial investigation" of charges before reference thereof to a general court-martial for trial, was substantially complied with in this case.

2. Whether, in any event, compliance with AW 70 is a jurisdictional prerequisite to a valid court-martial trial.

STATUTE INVOLVED.

The 70th Article of War (10 U. S. C. 1542) provides in pertinent part:

* * * * * * * *

> No charge will be referred to a general court-martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the in-

terest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

* * * * * * *

STATEMENT.

On August 26, 1944, respondent Bernard W. Smith, a private in the United States Army, was convicted in England by an Army general court-martial of rape and assault with intent to commit rape, in violation of AW 92 and 93 (10 U. S. C. 1564, 1565), respectively, and was sentenced to life imprisonment, dishonorable discharge, and forfeiture of all pay due and to become due (R. 73-75, 251-252). The proceedings were thereafter reviewed by two separate Army reviewing authorities (R. 42-58, 59-73), and on March 26, 1946, by order of the Secretary of War, at the direction of the President, the imprisonment portion of the sentence was commuted to 16 years (R. 38-39).

The petition for a writ of habeas corpus (R. 2-5) which gave rise to the present proceeding was filed January 2, 1947, in the District Court for the Middle District of Pennsylvania. So far as is now pertinent, the petition challenged the jurisdic-

tion of the court-martial on the ground that AW 70, *supra*, pp. 2-3, providing that charges be given a "thorough and impartial investigation" before being referred to a general court-martial for trial, had not been complied with, in that, allegedly, Lieutenant Todd, the investigating officer, "being the originator of the charges and the accuser in fact, was ineligible to be the impartial investigator under the 70th Article of War" (R. 4).[1] A rule to show cause issued (R. 6) and a response to the petition and rule was filed (R. 6-8). Following a hearing (R. 9-37), at which respondent and Todd testified and the court-martial record was received in evidence, the District Court wrote an opinion (R. 264-275) finding that AW 70 had been complied with, dismissed the rule to show cause, and denied the petition for the writ (R. 275). On appeal, the Court of Appeals for the Third Circuit, one judge dissenting (R. 284-287), reversed the order of the District Court and remanded the cause with directions to discharge respondent from custody (R. 287) on the ground that AW 70 had not been substantially complied with because the pre-trial investigation had not been thorough and impartial (R. 277-281, 284). The majority also held—necessarily, in view of their decision declaring the court-martial sentence void—that com-

[1] This was the first occasion on which any such contention was made, no such attack on the jurisdiction of the court-martial having been made at any time during the court-martial proceedings.

pliance with AW 70 is a jurisdictional prerequisite to a valid trial by general court-martial (R. 281-284). The dissenting judge assumed, *arguendo*, that compliance with AW 70 is such a jurisdictional prerequisite (though expressing "grave doubt" concerning the proposition, R. 284-285), but expressed the conviction that the District Court was fully justified in finding that there had been substantial compliance in this case (R. 285-287).

The relevant facts may be summarized as follows:

Late in the evening of July 11, 1944, an American soldier assaulted and attempted to commit rape upon an English girl named Miriam Cullum on a lonely roadside in England, but abandoned the attempt and fled when two passers-by approached (R. 164-169). Less than an hour later, the same soldier succeeded in committing rape upon another English girl, Sheila Dale, at approximately the same location (R. 119-127).

The rape of the Dale girl was reported to the British civilian police on the following morning, July 12, and during the following week a British constable named Felton conducted an extensive investigation, which included, towards the end of the week, the attempted rape on the Cullum girl (R. 96-97, 191-193, 197-199). During this investigation, Felton took statements from both girls concerning the attacks (R. 91-93, 258-260, 90) and also the statements of a number of other English civilian witnesses (R. 90, 93-96).

On July 18, 1944, Felton and another British constable went to the office of Lieutenant Alair Todd, the Provost Marshal of a nearby United States Army Air Force base known as "Raydon Aerodrome," told Todd about the attacks, and furnished him with a description of the girls' assailant as supplied by the girls (R. 31, 97). As a result of the interview, several soldiers attached to the base, among whom was the respondent, were summoned to Todd's office for questioning by Todd and the constables (R. 31-32, 97, 199-200). That evening, July 18, Todd conducted a line-up, or identification parade, consisting of 15 soldiers, including respondent, and both girls, independently, identified respondent as their attacker (R. 32-33, 97, 194-196).[2]

Immediately following this identification, each of the girls gave Felton another statement, supplementing her original statement (*supra*, p. 5), attesting to the fact of her identification of respondent at the line-up (R. 93, 260, 90).

On the following day, July 19, 1944, respondent's commanding officer, Captain MacGregor, filed formal charges accusing respondent of the offenses (R. 73-75), and on the day after that, July 20, Lieutenant Todd was designated to investigate the charges in accordance with AW 70 (R. 99).

Lieutenant Todd conducted the AW 70 investigation on July 21, 22, and 23, 1944 (R. 85, 86, 88, 97), and on July 24, 1944 (R. 99), he submitted his

[2] Both girls also identified respondent as their assailant at the trial (R. 127, 168).

"Pretrial Investigating Officer's Report" (R. 82-100), in which he recommended trial by general court-martial. In this report, he stated that "At the outset of the investigations, I informed the accused of the nature of the charges * * *; of the names of the accuser and witnesses * * *; of the fact that the charges were about to be investigated; of his right to cross-examine all available witnesses against him and to present anything he may desire in his own behalf, either in defense or mitigation; of his right to have the investigating officer examine available witnesses requested by him; and that it was not necessary for him to make any statement * * *, but that if he did make one it might be used against him" (R. 83).

Todd attached to his report three exhibits, containing the substance of the statements given him by the witnesses he interrogated and also certain documentary evidence examined by him, consisting of statements of witnesses to Constable Felton in the course of the latter's preliminary investigation (R. 83-84).[3]

[3] Exhibit A (R. 85-89) consisted of summaries of the statements of 15 witnesses interrogated by Todd at respondent's request.

Exhibit B (R. 90-97, 258-260) included certified copies of Miss Cullum's and Miss Dale's original (*supra*, p. 5) and supplementary (*supra*, p. 6) statements to Constable Felton and also certified copies of the statements of the other English civilian witnesses to Felton (*supra*, p. 5).

Exhibit C (R. 97-99) consisted of summaries of statements given to Todd by Miss Cullum and Miss Dale, which further

The court-martial trial took place on August 25 and 26, 1944 (R. 104), and Lieutenant Todd was detailed at the trial as assistant trial judge advocate (R. 111).

At the habeas corpus hearing, Lieutenant (then Captain) Todd testified that around July 16 or 17, 1944,[1] two British constables came to his office and told him about the attacks on the two English girls.

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supplemented their earlier statements to Felton, contained in Exhibit B.

Todd stated in his report that Miss Cullum and Miss Dale had been examined by him in respondent's presence; that respondent had been permitted to cross-examine the two girls with Todd's assistance, and that "Their testimony substantiated their statements [to Felton] shown on Exhibit B, with additional matter as shown on Exhibit C" (R. 83-84). Todd further stated in his report that respondent had been apprised of the statements made to Felton by the other English witnesses, as contained in Exhibit B, but that they were not examined in respondent's presence because respondent stated that he did not desire to cross-examine them (R. 84).

Beneath Miss Dale's statements to Felton (original and supplementary), as they appeared in Exhibit B, was the legend (R. 93) which is reproduced in the majority opinion below (R. 278-279). This legend was to the effect that the "Original statements" of Miss Dale were contained in Felton's pocket book, that a "true copy" of the statements had been made by a Detective Sergeant Shepherd (apparently another British police officer), and that Todd had, in turn, certified the copy attached to his report as a "true copy" of Shepherd's certified copy. A similar legend appeared beneath Miss Cullum's statements (original and supplementary) to Felton (R. 258-260, 90), as well as beneath each of the statements of the other English witnesses to Felton (R. 90, 94, 95, 96).

[1] Actually, as we have seen, the date was July 18, 1944 (*supra*, pp. 5-6).

This was Todd's first knowledge of the matter. The constables explained to Todd that an investigation had been started by "the C. I. D. [Criminal Investigation Division, U. S. Army]," and that they had come to the base to help in the investigation. The constables furnished Todd with a description of the assailant as supplied by the girls, whereupon Todd summoned several soldiers, among whom was respondent, for questioning. Respondent was questioned both by Todd and the constables. Todd subsequently conducted a line-up of 15 men, including respondent. Respondent consented to appearing in the line-up and, to insure fairness, Todd had the field chaplain and the field executive officer as well as the respondent's commanding officer, Captain MacGregor, witness the line-up. (R. 31-32). The English girls then, independently of each other and without hesitation, identified respondent as their attacker. Respondent later told Todd that he thought the line-up had been conducted fairly, though he still denied his guilt. (R. 33).

Todd further testified that when he was appointed AW 70 investigating officer he "was of a

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According to Todd's testimony, he conducted this line-up in his capacity as AW 70 investigator, several days after the interrogation of respondent in Todd's office (R. 32, 35-36). It is clear from the court-martial record, however, that Todd was mistaken in this respect. The line-up was conducted on the evening of July 18, 1944, the same day that respondent was interviewed in Todd's office, and two days before Todd's appointment as AW 70 investigation officer (*supra*, p. 6).

perfectly fair mind" and only "wanted to get at the truth of the matter" (R. 33). At the start of the investigation, he testified, he advised respondent that he could make a statement or not, as he chose, and that he could be present at the interrogation of all witnesses and examine them himself. Respondent did in fact accompany Todd whenever the latter went to question witnesses, Todd stated, and was given full opportunity to, and did, cross-examine them. Todd further testified that respondent requested him to call certain witnesses in his own behalf to substantiate his defense of alibi. Todd did call and question such witnesses, he said, and permitted respondent to question them. (R. 34).

With regard to Mrs. Kerry, a woman who had been in the company of the Cullum girl when respondent first accosted the latter, shortly before his assault on her (R. 164-165), Todd testified that he did not interrogate her because (R. 35)

> So far as from a prosecution standpoint it was not necessary. As far as from the Defense standpoint, I asked Smith if he wanted her and he said "No."*

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*The reason why Todd was asked particularly about Mrs. Kerry was the fact that respondent had previously testified at the hearing that Todd had advised him during the AW 70 investigation not to request that this witness be called and interrogated (R. 20). Todd, however, denied having given any such advice (R. 35).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the requirements of AW 70 were not substantially complied with in this case.

2. In holding that non-compliance with AW 70 is a fatal jurisdictional bar to a valid court-martial trial.

3. In reversing the order of the District Court and ordering respondent's discharge from custody.

REASONS FOR GRANTING THE WRIT.

This is a case where a soldier concededly subject to military law has been convicted by a lawfully constituted general court-martial, after a fair trial, upon overwhelming evidence of guilt, of one of the most serious offenses known to the law; where the sentence has been approved and confirmed after the record of trial was painstakingly reviewed (see R. 42-58, 59-73) by the agencies provided by law for that purpose; but where the trial has been held vitiated and the convicted person ordered freed, beyond practical possibility of re-trial, because of alleged errors occurring in the hinterland of the proceedings, long prior to the actual commencement of the trial. We submit that, in the words of Judge Learned Hand in an analogous case (*United States ex rel. McCann v. Thompson*, 144 F. 2d 604, 608 (C. A. 2); certiorari denied, 323 U. S. 790), "Nothing could more effectively defeat the interests of justice."

The Court of Appeals held (1) that the pre-trial investigation of the charges in this case was not thorough and impartial, with the result that the requirements of AW 70, *supra*, pp. 2-3, were not substantially complied with, and (2) that, by reason of such non-compliance, the court-martial trial was a nullity for lack of jurisdiction. If the court was wrong in either respect, its decision is unsupportable. We submit that it was wrong in both respects. The decision below, moreover, is in square conflict with a Second Circuit decision in respect of the first holding (*infra*, pp. 16-18) and is probably in conflict with a Seventh Circuit decision in respect of the second holding (*infra*, pp. 23-24).

1. *There was substantial compliance with AW 70.*—It is undisputed that Lieutenant Todd, the AW 70 investigating officer, fully advised respondent as to all his rights—to cross-examine adverse witnesses, present witnesses of his own, make a statement, or not, as he chose, etc.—and that respondent in fact took full advantage of all such rights (*supra*, pp. 7, 9-10). Todd testified, moreover—and the District Court accepted his testimony as true (R. 271)—that he entered upon his duties as investigating officer with a "perfectly fair mind," desiring only "to get at the truth of the matter" (*supra*, p. 9). Despite all these facts, however, the majority below held that Todd's investigation was not "thorough and impartial," as

required by AW 70, for the following three reasons: (a) Todd failed, in his capacity as AW 70 investigator, to interrogate the witness Mrs. Kerry (R. 280); (b) Todd subsequently was named assistant trial judge advocate at the court-martial trial (R. 281); and (c) Todd took part in the preliminary investigation, i. e., the investigation which preceded the filing of the formal charges which he subsequently investigated pursuant to AW 70 (R. 278-280). None of these reasons, we submit, warrants the conclusion reached that Todd's AW 70 investigation was not thorough and impartial. We discuss them briefly, *seriatim*:

(a) The majority's criticism of Todd's failure to interrogate Mrs. Kerry is, we submit, hypercritical. The failure manifestly did not show lack of impartiality, since respondent, according to Todd's testimony at the habeas corpus hearing (*supra*, p. 10), affirmatively indicated to him that he did not desire this witness to be interrogated. And Todd's belief that "from a prosecution standpoint it was not necessary" to interrogate her certainly had justification in view of the positiveness of both victims' identification of respondent as their assailant. Todd was conducting a *pre-trial* investigation of charges. He was not finally determining respondent's guilt or innocence. A pre-trial investigator obviously must exercise some discretion in determining the limits of his investigation. The majority below have, in effect, substituted their discretion for that of Todd.

(b) When Todd was appointed assistant trial judge advocate at the trial, his work as pre-trial investigating officer had been completed and his report filed. With the dissenting judge (R. 286), therefore, we cannot understand how Todd's subsequent appointment as assistant trial judge advocate could in any way support the conclusion of lack of impartiality or thoroughness during the pre-trial investigation. Cf. *Keyes* v. *United States*, 109 U. S. 336, 340; *Benjamin* v. *Hunter*, 169 F. 2d 512, 514 (C. A. 10).

(c) The third ground relied on as showing lack of impartiality and thoroughness on Todd's part during the pre-trial investigation—namely, that he participated to some extent in the preliminary investigation preceding the filing of the formal charges which he later investigated as AW 70 investigator—is the only ground, in our opinion, having any plausibility. We submit, however, that it is equally lacking in merit.

Todd's participation in the preliminary investigation was strictly limited and incidental. It consisted, in essence, of routine cooperation, in his capacity as Provost Marshal of respondent's station, with the British police and agents of the Army's Criminal Investigation Division, who were the true preliminary investigators of the offenses. Todd's cooperation, moreover, was limited to the final few hours of a week-long investigation. The investigation had been in progress for a week before Todd ever heard of the incidents that were being investi-

gated. He first learned about the matter under investigation when the two British constables, who had been working on the case in conjunction with the C. I. D. agents, came to his office to ask his cooperation in calling and questioning various suspect soldiers. Todd did summon suspects as requested, and, with the constables, interrogated them. He further cooperated with them to the extent of conducting the identification line-up on the evening of the same day. But that was the full extent of Todd's assistance in the preliminary investigation. He merely cooperated briefly with

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It is not true that Todd interrogated the English girls on the evening of the line-up or at any other time prior to his appointment as AW 70 investigator. The majority below were simply mistaken in saying that Todd "would seem to have interviewed the girls that same evening [*i.e.*, the evening of the line-up]" (R. 278). This conclusion of the majority is based on the fact that Todd certified copies of the Dale and Cullum girls' original and supplementary statements to the British constable, Felton, as being true copies of such statements. Manifestly, however, as indicated by the dissenting judge below (R. 286), this in no way indicates that Todd participated in the taking of the statements or that he was even present when they were taken. The circumstances under which the Dale and Cullum statements were taken and how Todd's name happened to appear on copies of them are fully explained in the Statement, *supra* (pp. 5, 6, 7, and note 3, pp. 7-8), and it is clear that Todd certified the copies of those statements as being true copies after he was appointed AW 70 investigating officer. As Todd testified at the habeas corpus hearing, his certification was merely his attestation that the statements were "a true copy of something the Dale girl [and the Cullum girl] said to the Constable" (R. 36). Todd did not personally interrogate either girl until after he was appointed AW 70 investigating officer (note 3, *supra*, pp. 7-8).

the preliminary investigators. He clearly was not "the real accuser," as the majority below referred to him (R. 284). It was not Todd who preferred the charges against respondent, but the latter's commanding officer, Captain MacGregor (*supra*, p. 6). The fact that Todd, in cooperation with the British police and the C. I. D. agents, conducted the line-up at which respondent was identified as the guilty person in no way precluded him, we submit, from entering upon his duties subsequently as the AW 70 investigator with a fair and unbiased mind, as he testified he did (*supra*, p. 9). As the dissenting judge tersely observed (R. 286), "The girls made the identification, not Todd."

The decision below, to the extent that it holds that AW 70 was not substantially complied with because of the AW 70 investigating officer's brief participation in the preliminary investigation which preceded the AW 70 investigation, squarely conflicts with a recent decision of the Court of Appeals for the Second Circuit, *Henry* v. *Hodges*, decided November 29, 1948 (not yet reported, but printed in Appendix A, *infra*, pp. 28-34). In that case (see also *Henry* v. *Hodges*, 76 F. Supp. 968, 970-971 (S. D. N. Y.), which the Second Circuit reversed), a Captain Meyers was ordered to investigate certain shortages of silver bullion. In the course of his investigation, he interrogated numerous witnesses, including a Captain Henry. At the conclusion of the investigation, Meyers filed a re-

port "detailing at length the facts as he believed them to exist as the result of his investigation," and including among his "conclusions" the statement that "Capt. Henry appears to be the main figure in the affair." Following submission of this report by Meyers, Henry was charged with embezzling the bullion, and Meyers was appointed to conduct the pre-trial investigation under AW 70. The Second Circuit, pretermitting the question of whether compliance with AW 70 is jurisdictional, unanimously held that the fact that the AW 70 investigating officer had conducted the original investigation which resulted in the filing of formal charges against Henry did not disable him from subsequently conducting a "thorough and impartial" investigation of those charges as provided for by AW 70. "There is not a syllable," the Second Circuit said (*infra*, p. 31), "to support the conclusion that in this case Captain Meyers was unwilling [in his capacity as AW 70 investigating officer] to reconsider the conclusions to which he had come before [in his capacity as the preliminary investigator]."

Since the AW 70 investigating officer in the *Henry* case had been *the* preliminary investigator, it is evident that the facts in the *Henry* case presented a much stronger argument against the AW 70 investigator's ability to make the "thorough and impartial" investigation provided for by AW 70 than do the facts in the case at bar. There is

thus a plain conflict between the *Henry* decision and the decision below, and this Court should exercise its supervisory power to resolve the conflict.

2. *In any event, non-compliance with AW 70 is not a jurisdictional defect vitiating the court-martial proceedings.*—But even if it be assumed, *arguendo*, that AW 70 was not substantially complied with in this case, numerous considerations indicate that compliance with AW 70 is not a jurisdictional prerequisite to a valid court-martial trial.

Preliminarily, it should be pointed out that the pre-trial investigation of charges provided for by AW 70 is unique in our law.[1] The investigating officer's functions differ in important respects from the functions both of the grand jury and the committing magistrate in civilian criminal law.[2] But

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[1] It is peculiar, indeed, to Army law, there being no comparable procedure provided for in the Articles for the Government of the Navy (34 U. S. C. 1200).

[2] The AW 70 investigator, unlike the grand jury, does not, for example, make the charges; he merely investigates them after someone else (who may be "a person subject to military law"; AW 70, 10 U. S. C. 1542, 1st paragraph) has made them. And while the grand jury almost universally proceeds *ex parte*, the AW 70 investigator must afford the accused an opportunity to be heard and to present matters on his own behalf.

While the procedure followed by the AW 70 investigator is somewhat similar to that followed by the committing magistrate (compare Rule 5, F. R. Crim. P., with AW 70, *supra*, pp. 2-3), the AW 70 investigator has no power to discharge a prisoner, as does the committing magistrate. All the investigating officer can do is make a recommendation, which may be followed or disregarded by the appointing authority.

even to the extent that the functions may be analogized, the analogies do not favor the view that AW 70 is jurisdictional. For such irregularities in the return of an indictment as the unlawful impaneling of the grand jury (*Harlan* v. *McGourin*, 218 U. S. 442, 451) and disqualification of the grand jurors to sit (*Kaizo* v. *Henry*, 211 U. S. 146, 149) do not affect the jurisdiction of the court which tries the accused. See *Sunal* v. *Large*, 332 U. S. 174, 179. And it is well settled that even where there has been no preliminary hearing at all before a committing magistrate, the error is not jurisdictional. *Burall* v. *Johnston*, 146 F. 2d 230 (C. A. 9), certiorari denied, 325 U. S. 887; *Clarke* v. *Huff*, 119 F. 2d 204 (C. A. D. C.); *Garrison* v. *Johnston*, 104 F. 2d 128, 130 (C. A. 9), certiorari denied, 308 U. S. 553; cf. *Goldsby* v. *United States*, 160 U. S. 70, 73.

That Congress never intended, and still does not suppose, that compliance with AW 70 is a *sine qua non* of court-martial jurisdiction, to be enforced by the civil courts in habeas corpus proceedings perhaps years after the conviction, is indicated by numerous considerations:

(a) The language of AW 70 is not cast in jurisdictional terms. It does not say, "No general court-martial shall have power to try an accused until after a thorough and impartial investigation of the charges * * *," but merely that "No charge will be referred [i. e., by the appointing authority]

to a general court martial for trial until after a thorough and impartial investigation thereof * * *."

(b) The fact that no provision comparable to AW 70 is contained in the Articles for the Government of the Navy (34 U. S. C. 1200) strongly suggests its non-jurisdictional nature.

(c) While compulsory process is available to secure the attendance of witnesses at the trial (AW 22, 10 U. S. C. 1493), process which is enforceable by prosecution in the civil courts (AW 23, 10 U. S. C. 1494), Congress has given the accused, with respect to witnesses at the pre-trial investigation, merely the opportunity "to cross-examine witnesses against him *if they are available*," and has directed the investigating officer merely to "examine *available* witnesses requested by the accused" (AW 70, *supra*, pp. 2-3). Certainly it would be surprising if Congress intended to make jurisdictional a mere preliminary to trial which it left unimplemented by any effective sanction to compel testimony. The contrary intention is almost conclusively indicated.

(d) Whereas the accused at the trial is entitled to counsel, either appointed (AW 11, 10 U. S. C. 1482) or personally retained (AW 17, 10 U. S. C. 1488), he has not been entitled to counsel at the pre-trial investigation. Dig. Op. JAG (1912-1940), §428(3), par. 3; *Romero* v. *Squier*, 133 F.

2d 528, 532 (C. A. 9), certiorari denied, 318 U. S. 785.[10]

(e) In 1937, Congress amended AW 70 to dispense with investigations prior to trial by summary and special courts-martial. Act of August 29, 1937, c. 716, §2, 50 Stat. 724. The committee reports on the bill (H. Rep. 1517 and S. Rep. 65, 75th Cong., 1st sess.) show that Congress intended to dispense with what amounted in practice to two trials of comparatively minor offenses. But there is no suggestion in the reports that Congress supposed it was eliminating a jurisdictional prerequisite to trials by inferior courts-martial.

(f) In 1946, the House Committee on Military Affairs recommended "That article of war 70 be amended to provide that failure to comply with its requirements for a thorough and impartial investigation before trial shall be a jurisdictional error" (H. Rep. 2722, 79th Cong., 2d sess., p. 3). Obviously the committee did not consider AW 70 to be jurisdictional as it stands. In the following year, the House Committee on Armed Services

[10] Effective February 1, 1949, however, the accused will for the first time be entitled to counsel at the pre-trial investigation. Act of June 24, 1948 (Public Law 759, 80th Cong.), §§ 222, 244. Aside from thus guaranteeing to the accused the right to counsel at the pre-trial investigation, this Act—making numerous changes in the Articles of War, to take effect February 1, 1949 (see §§ 201-244)—makes no change in the pertinent language of AW 70. The Act merely transfers the pertinent language of AW 70 to a different Article, *viz.*, AW 46(b). See §§ 222 and 231.

said, "Should the pre-trial investigation be made mandatory * * * we have concluded that an investigation should precede every general courts-martial trial but that the investigation should be considered sufficient if it has substantially protected the rights of the accused. To hold otherwise would subject every general courts-martial case to reversal for jurisdictional error on purely technical grounds" (H. Rep. 1034, 80th Cong., 1st sess., p. 7). Thus, although the two reports differ diametrically in their recommendations, they join in recognizing that non-compliance with AW 70 is not a jurisdictional error under existing law.

Although the Judge Advocate General early held that, *where there had been no investigation at all*, the court-martial proceedings were void *ab initio* (Dig. Op. JAG (1912-1940), §428(1), par. 2, p. 292), later holdings, representing the current view, are uniform to the effect that non-compliance with AW 70 is not jurisdictional. *Floyd*, 17 B. R. 149; *Hawkins*, 13 B. R. (ETO) 57; *Warnock*, 17 B. R. (ETO) 163; *Rackman*, 72 B. R. 267.[11] Thus in the *Rackman* case (August 1947), it was stated (Appendix B, *infra*, p. 44):

> The pre-trial investigation directed by Article of War 70 is for the benefit of the appoint-

[11] In view of the inaccessibility of Board of Review holdings, the cited holdings are copied in pertinent part in Appendix B, *infra*, pp. 35-46.

> ing and referring authority and compliance with said article is not, in any sense, jurisdictional. It is an administrative procedure prescribed by Congress for the purpose of informing the appointing and referring authority as to the facts of an alleged offense against the Articles of War committed by a member of his command to the end that he may determine the proper course of disciplinary action. It is directory and not mandatory in its operation and confers upon an accused no rights the deprivation of which affects the jurisdiction of the court to which charges against him are referred for trial. * * *

These administrative interpretations of one of the Articles of War by the agencies of judicial review established by law within the Army are entitled to great weight, and the courts have in fact placed a very considerable reliance on opinions of the Judge Advocate General dealing with questions of military law. *Bowen* v. *Johnston*, 306 U. S. 19, 29-30; *Hironimus* v. *Durant*, 168 F. 2d 288, 289-291 (C. A. 4), certiorari denied October 11, 1948, No. 149, Oct. Term, 1948; *Stout* v. *Hancock*, 146 F. 2d. 741, 743-744 (C. A. 4), certiorari denied, 325 U. S. 850.

The decision below, moreover, in holding that non-compliance with AW 70 is a jurisdictional error vitiating the trial, is in conflict with the holding in *Waite* v. *Overlade*, 164 F. 2d 722 (C. A. 7), certiorari denied, 334 U. S. 812. The holding of that

case would seem to be contained in the following language of the opinion (164 F. 2d, at 723-724):

> On appeal appellant asserts that the court-martial was without jurisdiction to try him because proper procedures had not been followed with respect to pre-trial investigation [and for other reasons].
>
> * * * * * * * *
>
> The record on this appeal establishes that appellant was, at the time of the offense charged, subject to military law and to trial for that offense by a general court-martial. Hence, if properly constituted, there is no question as to the jurisdiction of the court of his person and of the offense.[12]

No appellate decision to the contrary has been found. A district court decision, *Anthony v. Hunter*, 71 F. Supp. 823 (D. Kans.), appears to be to the contrary (see pp. 830-831), though the decision, holding the court-martial sentence to be void, was manifestly influenced to a great extent by a finding of fundamental and vitiating unfairness at the actual trial (see pp. 824-827, 831). Another district court case, *Hicks v. Hiatt*, 64 F. Supp. 238 (M. D. Pa.), states that the provisions of AW 70 "are

[12] Later in the opinion, however, in what appears to be *dictum*, the court said (164 F. 2d, at 724): "If there was any relaxation of pretrial investigation requirements not waived by appellant (and we are not convinced that there was), it certainly was not of a nature seriously to impair any of his fundamental constitutional rights."

mandatory" (p. 242), but this statement is clearly *dictum*; for one thing, the whole opinion is *dictum*, since it was filed after the case had become moot (see p. 250, note 28); furthermore, apart from the mootness feature, what actually was held was that the court-martial sentence was void because of a complete denial of due process of law by reason of the "totality of errors" pervading the entire proceedings, including the pre-trial, trial, and review stages. *Benjamin* v. *Hunter*, 169 F. 2d 512, 514 (C. A. 10), also contains a *dictum* to the effect that substantial compliance with AW 70 conditions the jurisdiction of the court-martial, but Circuit Judge Murrah, who was on the panel which decided the *Benjamin* case, subsequently emphasized, in a concurring opinion in *DeWar* v. *Hunter* (not yet reported; decided November 3, 1948), the *obiter* nature of the statement in the *Benjamin* case and cautioned against reliance on the "isolated statement." "None of the cases cited," Judge Murrah said, "or which I have been able to find, hold or infer that failure to comply with Article 70 ousts the court-martial of jurisdiction * * *." *Reilly* v. *Pescor*, 156 F. 2d 632, 634-635 (C. A. 8), certiorari denied, 329 U. S. 790, and *Henry* v. *Hodges*, (C. A. 2; Appendix, *infra*, pp. 28-34), merely assume, *arguendo*, that compliance with AW 70 is jurisdictional. *Thompson* v. *Sanford*, 163 F. 2d 830 (C. A. 5), certiorari denied, 333 U. S. 856, was an affirmance, without opinion, of a decision discharging the writ

in a habeas corpus proceeding in which the relator relied on an alleged deprivation of rights during the pretrial investigation (see our brief in opposition to certiorari, No. 163 Misc., O. T. 1947). It is not possible to know, therefore, whether the Fifth Circuit's ruling was that compliance with AW 70 is not jurisdictional or merely that there was substantial compliance in that case.

CONCLUSION.

For the reasons stated, the court below erred both in holding that AW 70 was not substantially complied with in this case and also in holding that compliance with AW 70 conditions the jurisdiction of the court-martial. There is a clear conflict of decisions in respect of the first holding and a probable conflict in respect of the latter. The decision is unsupportable if erroneous in either respect. As a result of the decision, a person unquestionably subject to military law who has been convicted after a fair trial of serious violations of the Articles of War has been ordered discharged because of alleged procedural irregularities occurring long before, and having nothing to do with, the actual trial. The decision thus works a miscarriage of justice in the individual case and, in view of the nature of the offenses involved, is manifestly undesirable. It furthermore sets an extremely harmful precedent in establishing the federal courts as forums in which to reexamine the minutiae of pre-trial investigation and handling of charges arising in the

armed forces. So long as no fundamental injustice or unfairness has been committed, it is not the function of the great writ of habeas corpus to give judges the right to enforce their hindsight judgment as to how the pre-trial investigation should have been conducted by the competent military authorities. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

December 1948.

APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 56—October Term, 1948.

(Argued Oct. 7, 1948 Decided Nov. 29, 1948.)

Docket No. 21086

FREDERIC HENRY, *Appellee*,

v.

GENERAL COURTNEY H. HODGES, *Appellant*.

Before L. HAND, SWAN and CHASE, Circuit Judges.

On appeal from an order of the District Court for the Southern District of New York, releasing on habeas corpus the relator from custody under the judgment of conviction of a general court-martial.

FREDERICK BERNAYS WIENER, for the appellant.
ROBERT N. GORMAN, for the appellee.

L. HAND, *Circuit Judge*: The respondent, who has custody of Henry, the relator, under a judgment of conviction of a general court-martial, appeals from an order, releasing Henry upon habeas

corpus. Only two questions are at issue: (1) whether Henry was deprived of that "thorough and impartial investigation," preliminary to convening a "general court-martial," which the Seventieth Article of War,[1] affords; and (2) whether the "general court-martial" before which he was tried was improperly constituted under the Eighth Article of War,[2] because the "law member" was not "an officer of the Judge Advocate General's Department." The district judge held with the relator on the first point, and with the respondent on the second; he has stated the underlying facts in an opinion,[3] and we need not repeat them here, but will proceed at once to discuss the issues they raise.

We shall not decide whether the "thorough and impartial investigation," prescribed by the Seventieth Article of War, is a condition upon the jurisdiction of a "general court-martial" such that its absence is a defect of jurisdiction, which exposes a subsequent conviction by the court to attack by habeas corpus. A majority of the Third Circuit has recently so held,[4] and we shall assume *arguendo* that they were right. What we do decide is that, when the accused has had the substance of that protection which the statute intended him to have,

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[1] § 1542, Title 10, U. S. Code.

[2] § 1479, Title 10, U. S. Code.

[3] 76 Fed. Supp. 968.

[4] Smith v. Hiatt, 170 Fed. (2)

formal defects do not touch the jurisdiction of the court.

Before charges were filed, Captain Meyers made an extended investigation of the occurrences in question. He examined a number of statements of witnesses taken by Captain Stavor; some of these witnesses he himself examined; some additional witnesses he examined on his own account; and he interviewed Henry personally at length. All this material he put together in a preliminary report, which, had he made it up after the charges were preferred, would have answered all the requirements of the Seventieth Article, as a "thorough and impartial investigation." However, he did not prepare it to be such an investigation, and his findings were tentative; it was only after the charges had been verified and filed, that he made that final report, whose sufficiency is now challenged. The first question is whether he was disqualified in this because of his preliminary report with its tentative conclusions.

There is no inherent reason to deny power to a judicial officer to review his own judgments, even though they be final and decide the very merits of the cause; at common law this was permissible.[5]

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[5] Fink v. Tod, 1 Fed. (2) 246, 249, 250 (C. A. 2); Pierce v. Delamater, 1 New York 17; Oakley v. Aspinwall, 3 N. Y. 547, 553 (semble); In re Carter's Will, 193 App. Div. 356, 358; In re Navroidi's Estate, 60 N. Y. Supp. (2) 344; Forde v. Commonwealth, 16 Grattan, 547, 551, 552; Burguieres v. Farrell, 85 S. W. (2) 952, 956 (Tex. Civ. App.); Galveston & H.

True, it has long been the custom to forbid it by statute and there are good grounds for so doing; but it still persists in the practice of bringing on a motion for a new trial for errors of law before the judge who made the original decision. Rightly or wrongly, judges are credited *pro tanto* with enough detachment to be able to re-examine impartially what they have done; at least when, as here, the final disposition will in the end be determined by others. There is not a syllable to support the conclusion that in this case Captain Meyers was unwilling to reconsider the conclusions to which he had come before; and we can see no reason to suppose that in result the "post-charges" report did not comply with the statute. Indeed, so far as Henry has any complaint whatever, it is not to that there never was that "thorough and impartial investigation" which must precede the convening of a general court-martial, but that there had been no separate "investigation" preliminary to the preferring of charges against him. The Seventieth Article provides that the charges "must be signed by a person * * * under oath either that he has personal knowledge of, or has investigated the matters set forth therein and that the same are true in fact to the best of his knowledge and belief." Another officer than Meyers verified the charges in question.

Inv. Co. v. Grymes, 64 S. W. 778 (Tex. Sup. Ct.); Graham v. Selbie, 67 N. W. 831 (So. Dak.); Edwards v. "His Wife," 9 La. Ann. 321.

and, although he probably did so with Meyers' "pre-charges" report before him, there is no reason to assume that the "investigation" which he was charged with making may not have been of the exhibits which were attached to Meyers' report rather than upon the bare report. We should have no warrant for assuming the contrary, or for holding that the charges were not regular.

Moreover, the issue is not in the case anyway, for Henry assented to the "post-charges" investigation without reserve. After Meyers had filed his preliminary report, after the charges had themselves been filed, and after he had been ordered to make the "post-charges" investigation, he showed his preliminary report to Henry, containing, as it did the twelve exhibits which fill eighty-four typed pages and which contained everything he had acted upon, and meant to act upon again (the testimony, the statements and the documents). He asked Henry whether he wished "to cross-examine any witness," and Henry said he did not; he named nine witnesses specifically whom he suggested that he might call, and he asked Henry whether he wished to cross-examine any of these, and Henry said he did not; finally, he asked Henry whether he wished to make any further statement of his own, and Henry said that he did not. It was only after this that he made the report on which the general court-martial was convened. That was dated October

more in detail, showing that he had gone over the ground again and repeating that Henry did not wish to make any "statement," although he had said that he meant to call four witnesses in his defense at the trial. Henry did not deny that he had been shown the preliminary report with its accompanying exhibits, or that he had not wished to cross-examine the witnesses, or that he had not refused to make any added statement on his own behalf. He did swear that he had asked Meyers to call four witnesses at the hearing under the Seventieth Article, and that Meyers refused; but Meyers denied this, and the court found against Henry. That finding concededly we should not reverse.

It is on such a showing that we are asked to hold that the substance of the protection which the Seventieth Article provides was so far denied Henry that the court-martial had no jurisdiction to proceed. Chief Judge Biggs in *Hicks v. Hiatt*,[3] held that, where the cumulation of incidents in a trial persuasively shows that the accused has been denied a fair trial, the conviction should be reversed, as wanting "due process of law." We do not mean to suggest that this is not a ground for declaring that the court did not have jurisdiction of the case, but here there was no shadow of oppression or of denial of "due process of law"; there was nothing which by any possibility could have prejudiced Henry in his defense. Unless we are to treat

every procedural defect, however trivial, as impairing the jurisdiction of the court, this is no case to intervene.

There remains the second question: the irregularity in the constitution of the court: i. e., whether any member of the Judge Advocate General's department was "available" at the time. We cannot say that it was not more in the interest of justice to detail Beatty to defend Feltman than to put him on the court; or that it was not better judgment to make Swan a prosecutor than a judge; and these were the only officers of the Department whom Henry claims to have been "available." The whole question is especially one of discretion; and, if it is ever reviewable, certainly the record at bar is without evidence which would justify a review. The commanding officer who convenes the court must decide what membership will be least to the "injury of the service," and what officers are "available." "Available" means more than presently "accessible"; it demands a balance between the conflicting demands upon the service, and it must be determined on the spot.

Order reversed; writ dismissed.

Martin v. Mott, 12 Wheat. 19; Mullan v. United States, 140 U. S. 240; Swaim v. United States, 165 U. S. 553; Bishop v. United States, 197 U. S. 334; Kahn v. Anderson, 255 U. S. 1.

APPENDIX B.

Floyd, 17 B. R. 149:

6. There is nothing in the record of trial and accompanying papers to show that the requirements of Article of War 70 for a pre-trial investigation of the charges were complied with, nor does it appear that the appointing authority referred the charges to his staff judge advocate for consideration and advice prior to reference for trial. Furthermore, before acting upon the proceedings, the reviewing authority, so far as appears, did not refer the record of trial to a staff judge advocate as required by Article of War 46. Ordinarily, a presumption of regularity in the performance of their duties by the officers responsible for the fulfillment of these requirements might be indulged (par. 112*a*, M. C. M.). The circumstances of this case, however, suggest that the requirements were not in fact complied with.

The requirements for reference of charges and records of trial to staff judge advocates have heretofore been held to be directory only and to have no effect upon the legality of the proceedings (CM 215720, *Pool*; CM 215721, *Klobucher*; CM 224823, *Greunebach*). However, in 1924, the Board of Review held that the provisions of Article of War 70 and paragraph 76*a*, Manual for Courts-Martial, 1921, relating to pre trial investigation, were juris-

dered the proceedings of the court void *ab initio* (CM 161728, *Clark*). Subsequently holdings of the Board of Review have reached the same result (CM 182225, *Keller*; CM 183183, *Claybaugh*). In neither of these latter cases was the holding based upon lack of jurisdiction; rather, the theory appears to have been that failure to comply with Article of War 70 was *per se* an error injuriously affecting the substantial rights of accused. Although these cases have not been expressly overruled, opinions on analogous points indicate that the first three paragraphs of Article of War 70 have come to be regarded as directory only in all respects and that failure to comply therewith is not fatal error. The following cases represent examples of this view; Sec. 376(3), Dig. Op. J. A. G., 1912-1940 (failure to swear witness not prejudicial error where facts admitted or otherwise proved); CM 172002, *Nickerson* (failure to sign or swear to charges); CM 201563, *Davis* (report of investigation by telephone instead of in writing); CM 202511, *Godfrey* (no reinvestigation after staff judge advocate had amended charges by changing the article of war and the name of the owner of stolen property); CM 206697, *Brown* (reference of charges to accuser for investigation). The *Nickerson* case contains the following apt language:

> "The provisions of A. W. 70 requiring the charges and specifications to be sworn to, was intended for the benefit of the accused in or-

der that he might not be subjected to frivolous or malicious prosecution and if he did not object to the irregularity and the accusation is sustained by the proof, the fact that the charge and specifications were not sworn to would not in itself injuriously affect any of the substantial rights of the accused." (CM 172002, *Nickerson*).

The reasoning in the *Nickerson* case applies with equal logic to the present case.

The foregoing cases, together with those holding that failure to make the required references to staff judge advocates is not fatal error, justify the conclusion that the investigation required by Article of War 70 is not mandatory, and that its omission does not constitute fatal error. This conclusion coincides with the apparent Congressional intention in enacting the statute, which was to prevent "unnecessary and unjust trials" based "on flimsy evidence without a prima facie case." (Hearings before the Senate Committee on Military Affairs on S. B. 5320, 65th Cong., 3rd Sess., p. 108; Hearings before the Subcommittee, Senate Committee on Military Affairs, on S. B. 64, 66th Cong., 1st Sess., pp. 101, 1390; Proceedings, Report of Special War Department Board on Courts-Martial and Their Procedure, July 17, 1919, p. 5). The requirements are wholly procedural and do not affect the processes of courts martial in their determinations of guilt or innocence. Although the language of a statute is mandatory it may be regarded as di-

rectory if the legislative purpose can best be carried out by such a construction (59 C. J. 1072). Moreover, the Supreme Court has held that the provisions of the Fourth, Fifth and Sixth Amendments to the Constitution, which are mandatory in form and some of which involve procedural matters, are not limitations upon the jurisdiction of the trial court and may be waived (see, for example, *Trono* v. *United States*, 199 U. S., 521; *Diaz* v. *United States*, 223 U. S., 442; *Segourola* v. *United States*, 275 U. S. 106; *Johnson* v. *Zerbst*, 304 U. S. 458). In *United States* v. *Gill*, 55 Fed. (2nd) 399, a United States district court has expressed the view that indictment by a grand jury (a procedure basically similar to investigation of charges) may be waived. In reaching this conclusion the court applied the reasoning of the Supreme Court in *Patton* v. *United States*, 281 U. S. 276, a case pertaining to waiver of trial by jury in criminal cases, guaranteed by section 2, Article III of the Constitution. In that case the Supreme Court said, among other things:

> "The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of the oppressive power of

> the King and the arbitrary or partial judgment of the court. Thus Blackstone, who held trial by jury both in civil and criminal cases in such esteem that he called it 'the glory of the English law', nevertheless looked upon it as a 'privilege,' albeit, 'the most transcendent privilege which any subject can enjoy.'
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> * * * * * * * * *
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> "In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused.
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> * * * * * * * * *
>
> "Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement" (*Patton v. United States*, 281 U. S., 276, 296-298).

For the foregoing reasons it is the opinion of the Board of Review that the provisions of Article of War 70 requiring investigation of the charges before trial are not jurisdictional, and that under the circumstances of the present case failure to comply with them did not injuriously affect the substantial rights of accused. To quote from a penetrating review by the staff judge advocate in the *Brown* case (CM 206697):

"If * * * a thorough and impartial investigation is not had, [and] nevertheless the charges are referred for trial, a fair trial is had which results in conviction, and the sentence is approved; all that the accused has suffered is *injuria sine damno*, a technical wrong which did him no harm. The law ought not to admit that a guilty man is harmed if tried, convicted, and sentenced; and, if he has had a fair trial and has been convicted, the law, if it does not stultify itself, must assume him to have been guilty. The case therefore falls within the exact language of A. W. 37. * * * It was no part of the purpose of the authors of A. W. 70 to prevent the trial, conviction, and punishment of a guilty man."

In so far as the *Clark*, *Keller* and *Claybaugh* cases are in conflict with this holding, they should no longer be followed.

It may be noted that the appellate jurisdiction granted to the Board of Review by Article of War 50-½ relates entirely to the "record of trial" and on its face is not concerned with extraneous matters of procedure. However, the conclusions of the Board are not based upon this ground.

* * * * * * *

Hawkins; 13 B. R. (ETO) 57:

* * * * * * *

7. The papers accompanying the record of trial show that the charge laid under the 75th Article of War was investigated as required by AW 70 and

par. 35, MCM, 1928. Thereafter the staff judge advocate cancelled the charge thus investigated and submitted to the Commanding General of the 35th Infantry Division the charge under Articles of War 58 28 upon which accused was arraigned and tried. The charge sheet was not resigned and was not re-verified by the accuser and no further investigation was made of the new charge. It has been established that the investigation of the charges is an administrative process intended primarily for the benefit of the appointing authority and is not jurisdictional (CM 229477, *Floyd*, 17 B. R. 149). It has also been determined that:

> "The provision of AW 70 requiring the charges and specifications to be sworn to, was intended for the benefit of the accused in order that he might not be subjected to frivolous or malicious prosecution, and if he did not object to the irregularity and the accusation is sustained by the proof, the fact that the charge and specifications were not sworn to would not in itself injuriously affect any of the substantial rights of the accused" (CM 172002, *Nickerson*).

The *Nickerson* and *Floyd* cases, above cited, definitely determine that the requirements of the first three paragraphs of the 70th Article of War are directory and not mandatory and the failure to observe all or any of them neither deprives the court of jurisdiction nor do such defects and imperfec-

tions by the pre-trial procedure necessarily prejudice the substantial rights of an accused.

* * * * * * *

The Board of Review is clearly of the opinion that the practice followed in the instant case affords no reason for disturbing the findings of the Court that accused was guilty of desertion.

* * * * * * *

Warnock, 17 B. R. (ETO) 163:

* * * * * * *

The foregoing holdings support the conclusion that violations of the provisions of the 70th Article of War do not affect the jurisdiction of the court, and except under extraordinary or unusual circumstances do not constitute error prejudicial to the substantial rights of accused. This conception of the 70th Article of War views the requirements thereof as administrative in nature and of immediate concern to the authority holding general court-martial jurisdiction. Many of the provisions are intended for his benefit in order to enable him to act fairly and intelligently upon the charges. Other requirements of the Article are for the benefit of the accused and are intended to protect him against unwarranted or malicious prosecution of unfounded charges. It is the duty and function of the authority referring the charges for trial to insist that there be reasonable compliance in good faith with this Article of War in preparing and investigating the charges. Usually the require-

ments of the 70th Article of War do not concern the court after reference of the charges to it for trial. The action of the appointing and referring authority is binding upon the court in respect to such matters (CM ETO 4570, *Hawkins*, supra; CM ETO 5155, *Carroll* and *D'Elia*, supra).

* * * * * * *

Buckman, 72 B. R. 267:

* * * * * * *

We might dispose of the defense contention that the investigation was inadequate, upon accused's own statement that he agreed with the investigating officer not to interview witnesses other than the two mentioned. However, the foregoing matters are set forth in considerable detail, not for the purpose of showing that there had been sufficient compliance with the provisions of Article of War 70 to vest the court with jurisdiction to try accused, but to illustrate the wide-spread misconception of the purpose and intent of Article of War 70. It is not the function of the court-martial, once a case has been referred to it for trial, to try and determine whether the appointing authority, in the exercise of his power to refer a case for trial, has breached the bounds set forth by Article of War 70. The pertinent part of the Article reads, "No charge will be referred to a general court-martial (by the referring authority) for trial until after a thorough and impartial investigation thereof shall have been made." (Parenthetical remark

supplied.) It does not say, "No general court-martial shall have power to try an accused until after a thorough and impartial investigation of the charge shall have been made." If an accused feels that he is not being given a fair and impartial investigation, that is a matter properly to be brought to the attention of the appointing authority before trial of the case, with such request as the accused deems appropriate. In other words, the sufficiency of the investigation is a matter of primary and vital concern to the accused and to the authority directing such investigation. If accused believes he is the victim of capricious and ill founded charges, he can invoke the provisions of Article of War 121 directing his complaint, through channels, even to the War Department.

The pre-trial investigation directed by Article of War 70 is for the benefit of the appointing and referring authority and compliance with said article is not, in any sense, jurisdictional. It is an administrative procedure prescribed by Congress for the purpose of informing the appointing and referring authority as to the facts of an alleged offense against the Articles of War committed by a member of his command to the end that he may determine the proper course of disciplinary action. It is directory and not mandatory in its operation and confers upon an accused no rights the deprivation of which affects the jurisdiction of the court to which charges against him are referred for trial.

And, a fortiori, the failure of the appointing or referring authority to comply with the provisions of said article does not constitute ground for annulling a sentence by general court-martial otherwise valid and enforceable.

For a discussion of the legislative intent of Article of War 70 see CM 229477, *Hoegh*, 17 BR 149, 156, wherein it is shown that the provisions of Article of War 70 are entirely administrative in character, not affecting the jurisdiction of general courts-martial, and in which it is also noted that the appellate jurisdiction granted to the Board of Review by Article of War 50-½ relates entirely to the "Record of trial" and is not concerned with extraneous matters of (administrative) procedure. A contrary view would allow a defect in a purely administrative and preliminary hearing to vitiate the judicial proceeding. Analogies cannot be effectively drawn between the investigation required by Article of War 70 and the grand jury procedure required by the Fifth Amendment to the Constitution of the United States. The Fifth Amendment specifically excepts cases arising in the land and naval forces from the grand jury requirements. The State and Federal courts empanel grand juries and, within the purview of the various statutory and code provisions, supervise the conduct of such bodies. In military jurisprudence, the court-martial ordered to try a given case may not have been in existence during the investigation and as has

been stated has no relation thereto. To be sure, an accused, upon representations made to the court that due to inadequacy of the investigation he is unable to properly prepare his defense and is not ready to proceed, may justly be entitled to a continuance for the purpose of securing witnesses or producing evidence, for the court must safeguard accused's right to a fair trial. But a plea in bar of trial upon the ground of defective investigation, if granted, would amount to an unauthorized invasion of the prerogatives of the appointing or referring authority. The function of the court is to "well and truly try and determine, according to the evidence, the matter now before" it, between the United States of America and the person to be tried, and "to administer justice, without partiality, favor or affection, according to the provisions of the rules and articles for the government of the armies of the United States * * *" (AW 19). Its function does not include a determination of whether the appointing or referring authority ordered trial without a fair and impartial investigation.